93-334

No. _____

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In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, and WARREN LUTTRELL,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth District Of Texas

PETITION FOR WRIT OF CERTIORARI

PAUL E. KNISELY
Counsel of Record

BROADUS A. SPIVEY
SPIVEY, GRIGG, KELLY & KNISELY
P.O. Box 2011
Austin, TX 78768
512/474-6061 (Fax 512/474-1605)

GILBERT I. LOW
ORGAIN, BELL & TUCKER
470 Orleans St.
Beaumont, TX 77701
409/838-6412 (Fax 409/838-6959)

Counsel For Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the improper submission of an "unavoidable accident" instruction to the jury by the Texas state trial court in this FELA case constituted reversible error as a matter of federal FELA law, requiring a new trial on Petitioner's claims for injuries arising out of the crash-landing of an airplane which Respondents were using for "deadheading" Petitioner and fellow Southern Pacific railroad crew members from New Mexico to Texas.

2. Whether as a matter of federal FELA law the Respondent railroad or the other Respondents involved in the for-profit transportation of Petitioner and fellow railroad crew members by aircraft were negligent per se in conducting an unauthorized commercial aircraft operation in violation of Part 135 of the Federal Aviation Regulations.

LIST OF PARTIES

PETITIONER:

NICK GARCIA

RESPONDENTS:

SOUTHERN PACIFIC TRANSPORTATION COMPANY
JACKIE HOLMES
MIKE WARREN
SOUTHWEST AIR LEASING
GENE'S FLIGHT CLUB OF EL PASO
WARREN LUTTRELL

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Nick Garcia, Petitioner in this cause, and files this Petition for Writ of Certiorari, requesting that the Supreme Court reverse the judgments of the Texas state courts below in favor of Respondents and remand this cause for a new trial on Petitioner's personal injury claims under the FELA.

As grounds for such relief, Petitioner would respectfully show as follows:

OPINIONS BELOW

The opinion of the Ninth District Court of Appeals of Texas is unpublished. *Garcia v. Southwest Air Leasing,* Cause No. 09-91-00284-CV (Tex. App. – Beaumont 1993, writ denied). That opinion is attached to this petition as Appendix A.

The Order of the Supreme Court of Texas denying Petitioner's application for writ of error is attached as Appendix B.

This petition for writ of certiorari is filed because the opinion and judgment of the Beaumont Court of Appeals denying Petitioner a new trial on his FELA claims conflicts with Federal law governing FELA jury trials.

JURISDICTION

The Beaumont Court of Appeals affirmed the take-nothing trial court judgment for Respondents on December 3, 1992. Petitioner's motion for rehearing in that court was denied on January 7, 1993. The Supreme Court of Texas denied Petitioner's application for writ of error on April 14, 1993, and denied Petitioner's motion for rehearing of the application on June 3, 1993.

This petition for writ of certiorari is filed within 90 days after the final denial of review by the highest Texas court. The Supreme Court's jurisdiction is founded on 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Federal Employers Liability Act (FELA) provides:

> **Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in**

> **damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .**

45 U.S.C. § 51.

The controlling Federal Aviation Regulation (FAR) states:

> **No person may operate an aircraft under this Part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part. . . .**

FAR § 135.5.

STATEMENT OF THE CASE

This is an FELA case arising from the crash-landing of a single-engine Piper Lance airplane carrying four Southern Pacific railroad employees. The incident occurred on August 2, 1988, in El Paso, Texas.

1. The Parties

The parties, and other principal persons and entities in this case, are:

NICK GARCIA – Petitioner in this case and plaintiff in the trial court. Mr. Garcia was 37 years old and had been employed by Southern Pacific for 17 years at the time of his back injury in the plane crash in 1988. He resides in El Paso, Texas, with his wife and one child.

SOUTHERN PACIFIC TRANSPORTATION COMPANY (Southern Pacific) – Respondent in this case and a defendant in the trial court. Southern Pacific is Petitioner Garcia's employer and had contracted for the use of the

airplane to transport ("deadhead") Petitioner and other train crew members from out-of-state terminals back to their homes in El Paso.

JACKIE HOLMES – Respondent in this case and a defendant in the trial court. Holmes was an employee of Southern Pacific. Holmes purchased the airplane, but was barred by Southern Pacific's conflict-of-interest policies from doing business with the railroad. Holmes devised a profit-sharing arrangement with Mike Warren whereby Holmes, using Warren's name and the assumed name of "Southwest Air Leasing" as a cover, contracted with Southern Pacific to transport the railroad's employees in Holmes's plane, using contract pilots from Gene's Flight Club of El Paso.

MIKE WARREN – Respondent in this case and one of the defendants in the trial court. Warren, in exchange for a share of the profits to be earned by Jackie Holmes, acted as a "front" for Holmes in negotiating and signing the contract with Respondent Southern Pacific for the transportation of railroad employees in Holmes's airplane.

SOUTHWEST AIR LEASING – Respondent in this case and a defendant in the trial court. This "entity" does not have a separate legal existence; it was merely a name under which Respondents Holmes and Warren were operating to provide air transportation of railroad employees under their arrangement with Southern Pacific.

GENE'S FLIGHT CLUB OF EL PASO – Respondent in this case and a defendant in the trial court. Gene's Flight Club provided pilots for the Southern Pacific flights on the Piper airplane under an arrangement with Respondents Southern Pacific, Holmes, and Warren. Gene's Flight Club furnished Respondent Warren Luttrell to pilot the Piper airplane for the

first time on the flight which resulted in the crash in question.

WARREN LUTTRELL – Respondent in this case and a defendant in the trial court. Mr. Luttrell was the pilot of the Piper aircraft which crashed on the occasion in question when he elected to try to land during a thunderstorm in El Paso.

SOUTHWEST AVIATION, INC. – A general aviation and aircraft service company in El Paso. It was formerly a party defendant in this case, but a summary judgment was granted in its favor because it was concluded that this entity did not play a role in the obtaining or performing the contract for transporting the Southern Pacific employees. Respondent Mike Warren had falsely held himself out as an officer of "Southwest Aviation, Inc." in some of his negotiations with the railroad for the use of Holmes's airplane.

2. The Plane Crash – How It Happened

On August 2, 1988, a single-engine Piper airplane crashed while attempting a landing at the El Paso International Airport during a severe thunderstorm. As the airplane approached El Paso, it encountered violent weather, and the pilot was repeatedly warned by the approach control and tower personnel of the thunderstorm and consequent wind-shear hazard over the airport. Proceeding nonetheless to attempt to land, the pilot lost control of the aircraft when it was struck by a wind shear over the runway; it crash-landed, injuring three of the four passengers seriously. Nick Garcia was one of the passengers; he sustained a serious and permanent lower back injury as a result of the crash.

The evidence at trial showed that Southern Pacific has contracted for the use of the airplane to "deadhead"[1] some of its employees from Tucumcari, New Mexico, to El Paso, Texas.[2] On August 1, the day before the crash, Petitioner Garcia and co-worker, Duke LeClair, had been part of a crew that operated a Southern Pacific train from El Paso to Tucumcari, a distance of about 330 rail miles. There they met the members of another train crew, Floyd Nelson and Clifford Printz. The four of them stayed overnight and were scheduled by Southern Pacific to be deadheaded back to El Paso the next day.

Commercial pilots for the deadheading flights for Southern Pacific were hired from Gene's Flight Club of El Paso, Inc. The pilot who usually handled the flights was unavailable on August 2, so Respondent Warren Luttrell was hired to fly the Piper airplane on that occasion. Luttrell had never before flown that particular airplane.

Luttrell flew from El Paso to Tucumcari, where he picked up the four men for the return trip. Though there was some disagreement among the witnesses about how rough the flight back from Tucumcari was, it is undisputed that the weather worsened as they neared El Paso, and that during their approach a severe thunderstorm

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[1] The term "deadheading" is used by railroad workers to describe how the railroad transports them from one railroad terminal to another. A "deadhead" has been defined as: "An employee riding on a pass. A non-paying passenger." R.F. Adams, *Language of the Railroads,* p. 42 (Univ. of Okla, Press, 1977).

[2] The peculiar arrangements entered into among the Respondents for the use of the airplane are described further below. Their plans and schemes for making the deadheading operation a profitable enterprise also form the basis for Petitioner's contention below that Respondents were negligent per se in conducting business as a commercial air transport carrier without an FAR-mandated certification.

was in progress on the field at the El Paso International Airport.

At 3:54 p.m., Luttrell contacted the El Paso airport's approach control. At 4:06 p.m., when the plane was 42 miles from the airport, Luttrell was advised by controllers that the airport "went IFR" (instrument flight rules); it was closed to landings by VFR (visual flight rules). Luttrell responded that the airplane was IFR-equipped, and he persisted in asking for clearance to land instead of altering his flight or delaying for a short while to allow the thunderstorm to dissipate or move away from the vicinity of the airport.

Luttrell admitted at trial that the thunderstorm was clearly visible from more than 20 miles from the airport. His passengers all testified that they could see huge black storm clouds and lightning bolts over the airport, and that the storm obscured much of the nearby mountains and surrounding landscape. The flight became very turbulent and was frightening to the passengers. It began raining hard as they neared the airport. The heavy thunderstorm and rain continued throughout the final approach and landing.[3]

At 4:09 p.m., approach control advised Luttrell that the official visibility at the airport was less than one-eighth of a mile, which is below the minimum even for IFR landings. It was undisputed that Luttrell, the pilot in command – not the control tower – had the ultimate right to determine whether to land or not to land under those conditions. Luttrell elected to try to land.

At 4:11 p.m., Luttrell was "handed off" from the approach control to the airport tower. Fifteen seconds later, Luttrell received clearance to land, but the tower

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[3] The evidence reflects that the thunderstorm in El Paso that day was so severe that the rain collapsed the roof on a supermarket very near the airport.

also issued a **wind shear warning** to him and specifically admonished him that there was a **"thunderstorm in progress over the airport."** At 4:13:05 p.m., the tower issued **another wind shear warning** to Luttrell.

At 4:15:34 p.m., the tower tried to contact Luttrell, but received no response. At 4:15:59, the tower was alerted to an emergency signal (ELT) from the aircraft which is triggered by impact. At 4:16:41, the tower was contacted by Luttrell, who notified the tower that the plane was on the runway and was disabled.

It is undisputed that the aircraft encountered and was buffeted by a **wind shear** as it was just a few feet off the ground preparing to land.[4] The aircraft was thrust sideways by the wind. Luttrell tried to realign the plane with the runway, but the airplane's stall warning beeper and stall buzzer actuated in succession, and Luttrell had to increase his airspeed suddenly to avert a stall. The airplane then simply "stopped flying" and dropped the last 15 feet or so to the ground. It bounced back into the air several feet, skidded down the wet runway through the rain for about 200 feet, and came to rest on its nose at the side of the runway.

The damage to the aircraft as a result of the crash included a mangled propeller and a collapsed nose wheel. It required approximately $19,000 to repair, inspect, and return the airplane to flying condition.

Respondent Luttrell based his claim at trial that he had not acted negligently on his recollection that the thunderstorm had "moved away from the part of the

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[4] A "wind shear" is a sudden updraft or downdraft of air due to air pressure differentials; it is a very serious hazard to aircraft and is particularly prevalent when thunderstorms are present. This meteorological condition is well-known by all pilots to be extremely dangerous, especially during landing.

airport" where he was landing. However, all of the airplane passengers disputed that testimony. In addition, it was undisputed that the runway upon which Luttrell was landing was closed by the tower to VFR traffic, and though he claimed he had it in sight, the runway was closed because the visibility was below VFR and IFR minimums. Luttrell further admitted that multiple wind shears are present throughout thunderstorms and that they create powerful forces which are extraordinarily dangerous during an approach to landing.

Norman Horton, an aeronautics specialist called by Petitioner as an expert witness, testified that wind shear can literally tear an aircraft apart; a pilot should *always* stay away from a thunderstorm to avoid the possibility of encountering a wind shear. He testified that Luttrell clearly was negligent in landing the aircraft under the conditions existing at the El Paso airport at the time.

3. Petitioner's Injuries

Petitioner Garcia and the other passengers in the airplane did not initially discern that they had suffered serious injuries in the accident. However, Mr. Garcia, as well as Mr. LeClair and Mr. Nelson, promptly sought medical treatment for the bruises and pain they sustained from being jolted and thrown about during the crash-landing.[5]

Nick Garcia was "beaten and bruised" after the crash. He had to take several days off work. He obtained medical treatment for lower back pain, and he was

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[5] Mr. LeClair and Mr. Nelson have since undergone significant medical treatment for injuries sustained in the accident. On December 4, 1992, LeClair and Nelson settled their own claims against Southern Pacific arising out of the plane crash for a combined total of $900,000.

referred to Dr. Arthur Bieganowski, an orthopedic specialist. The doctor diagnosed and treated Mr. Garcia for a herniated disc at the L5-S1 vertebrae. As a result of the injury, Mr. Garcia has undergone a disectomy and faces the possibility of additional surgery. Dr. Bieganowski testified that Mr. Garcia's herniated disc was directly caused by the jolt in the accident, and that it has resulted in permanent injury and impairment to him.

The cost of the medical care which Petitioner has received for his injuries amounted to $68,636.68 as of the time of trial. Additionally, Southern Pacific still has Petitioner placed on work restrictions which preclude him from working in the operations department because of his medical condition from these injuries.

4. The Southern Pacific/Holmes/Warren Arrangement

In late 1987 and early 1988, Southern Pacific entertained a series of proposals from Respondents Jackie Holmes and Mike Warren to transport train crews in the El Paso area between their "away-from-home terminals" and their "home terminal" by use of a private airplane. For a per-mile charge, Holmes and Warren proposed to deadhead the crews by plane rather than have them ride back home on their much slower freight trains. The plan was ostensibly offered as a means to try to save expense to the railroad by reducing the number of man-hours spent on transportation of workers.

In March of 1988, Holmes, a Southern Pacific conductor, purchased a six-seat Piper Lance aircraft from Southwest Aviation, Inc. However, as a Southern Pacific employee, it was a company-prohibited conflict of interest for Holmes to do business with the railroad. So in the meetings and negotiations with the railroad for the use of the airplane, Holmes's associate Mike Warren falsely held himself out as an officer of "Southwest Aviation, Inc.," while Holmes stayed in the background and used Warren

as a go-between. The records nonetheless showed, and the facts developed at trial confirmed, that executives of Southern Pacific were well aware of Jackie Holmes's thinly-disguised involvement in the negotiations.

In a letter dated December 8, 1987, on "Southwest Aviation, Inc." stationery and signed by "Michael J. Warren, Vice-President," Warren confirmed with Southern Pacific's Division Superintendent that "Southwest Aviation, Inc." was committing itself to provide a "charter passenger service" to Southern Pacific at a rate of 50 cents per aircraft mile. On February 16, 1988, an initial service contract with the railroad was signed by Warren as "President" of "Southwest Aviation, Inc."

On March 3, 1988, Holmes purchased the plane from Southwest Aviation, Inc.

Southern Pacific officials thereafter signed two additional contracts for the use of the plane. The first of these contracts, dated June 21, 1988, was signed by the railroad and sent to Warren for execution by "Southwest Aviation, Inc." Warren was out of town when that contract arrived for execution, so Holmes marked out the designation of "Southwest Aviation, Inc." on the contract **and signed it himself as "Jackie Holmes d/b/a S.W. Air Leasing."**

Holmes testified that the contract which he executed was rejected by the railroad because of his signature on it. The railroad sent another contract, also dated June 21, 1988, which was then signed by **"Mike Warren, Pres. Southwest Aviation, Inc.,"** and that contract was then accepted by Southern Pacific. Holmes admitted that Warren's name was used because Holmes needed a third party to contract with the railroad. In return for the use of his name, Warren was to receive ten percent of any profits which Holmes realized from the use of the plane.

It is now undisputed that Mike Warren was ***not*** an officer of Southwest Aviation, Inc., and had no authority to sign the contract on behalf of that company. Of course,

the company no longer even owned the airplane at the time the June 21 contract was executed, having sold it to Holmes in March. [6]

After the final contract was entered into – ostensibly with "Southwest Aviation, Inc.," but in reality with Holmes and Warren – the Piper aircraft was employed by the railroad not only to deadhead workers, but also to haul freight for the Railroad and to *fly railroad executives and officers*. Southern Pacific paid Holmes for the use of the plane for such purposes at the same rate as for the deadheading trips.

Warren Luttrell was paid by Southern Pacific for his services as a pilot on August 2, 1988.

4. Procedural History Of This Case

This suit was filed on May 29, 1989, in the 58th District Court of Jefferson County, Texas.[7] Petitioner's pleadings allege claims under the FELA as well as common law. Petitioner's FELA causes of action are based on both ordinary negligence and negligence per se, the latter for violation of Federal Aviation Regulations by Respondents in carrying out their for-profit air transport operation without a required commercial operator's certification.[8]

Respondents all filed answers denying liability.

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[6] It turned out that Warren's use of Southwest Aviation, Inc.'s name was totally unauthorized and that the company had no involvement in the Holmes-Warren Southern Pacific scheme for the use of the airplane.

[7] Petitioner's trial pleading was Plaintiff's First Amended Petition; it was filed on July 8, 1991.

[8] Though Respondent Southern Pacific, as Petitioner's employer, cannot be held liable for any causes of action other than under the FELA, the other Respondents could additionally be liable for common-law negligence.

The case proceeded to a jury trial on July 15, 1991. At the close of the evidence, the trial court submitted its charge to the jury with instructions and questions. The court specifically instructed the jury to consider whether the plane crash was an "unavoidable accident," as follows:

> "Unavoidable accident" means an occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it.

Petition's counsel objected to this instruction because there was no evidence in the record to justify injecting "unavoidable accident" into the case.

The court then submitted a single, global liability question relating to all of the Respondents. Attempting to encompass both the FELA claims and any common-law negligence causes of action, the question was framed (and answered as follows:

QUESTION NO. 1:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, and injury, if any, to Nick Garcia:

Answer "Yes" or "No" to each of the following:

	Answer "Yes" or "No"	
	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No
b. Warren Luttrell	No	No
c. Gene's Flight Club of El Paso, Inc.	No	No
d. Mike Warren	No	No
e. Southern Pacific	No	No

The jury's verdict was returned on July 22, 1991. It was against the Petitioner and in favor of all of the Respondents. The jury's "no" answers to all parts of the only liability question submitted ended the jury's inquiry.

On August 12, 1991, the trial court rendered a take-nothing judgment on the verdict. The Beaumont Court of appeals affirmed the judgment on December 3, 1992, and on January 7, 1993 denied Petitioner's motion for rehearing.

The Supreme Court of Texas denied Petitioner's application for writ of error on April 14, 1993, and denied Petitioner's motion for rehearing of the application on June 3, 1993.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED BECAUSE THE SUBMISSION OF AN "UNAVOIDABLE ACCIDENT" INSTRUCTION TO THE JURY IS INCONSISTENT WITH AND VIOLATIVE OF THE WELL-ESTABLISHED STANDARDS OF LIABILITY APPLICABLE TO PERSONAL INJURY CLAIMS UNDER THE FELA AND CONSTITUTES REVERSIBLE ERROR AS A MATTER OF FEDERAL SUBSTANTIVE LAW.

A. The trial court's submission of the "unavoidable accident" instruction to the jury constituted a fundamental and prejudicial violation of the substantive principles of federal FELA law which neither Texas state court submission practice nor Texas common law may supersede or violate.

B. The Texas court of appeals erred as a matter of federal FELA law in failing and refusing to reverse the trial court for submitting the instruction to the jury on "unavoidable accident" when there was no evidence of an "unavoidable accident" and the instruction directly affected the sole liability issue submitted to the jury.

The Texas state courts have disregarded the critical fact that Petitioner Nick Garcia is a railroad worker whose personal injury case is subject to the provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, et seq. When he went to work as a brakeman for Southern Pacific, Nick Garcia forfeited all of his common law rights against his employer for recovery for his injuries. This "forfeiture" was mandated by Congress in exchange for providing to railroad workers the specific protections, benefits, and advantages afforded through the FELA's special liability system.

This Court has long held that the FELA provides a substantive federal cause of action that cannot be destroyed or lessened by state rules of practice or procedure. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). The FELA's liberal statutory liability standards displace state and federal common-law doctrines, including even the concept of proximate cause. As this Court has recognized, the FELA was enacted precisely because

> the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. ***The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.***

Rogers, 352 U.S. 507-8.

Although Petitioner Garcia's injuries occurred in an unusual railroad-related aviation accident, *it is undisputed that Petitioner and the other railroad workers who were passengers on the plane were being transported by and for Respondent Southern Pacific, and that they were in the course and scope of their employment for the railroad at the time of the accident.* As a matter of law Petitioner's claims for damages against Southern Pacific arising from his injuries are therefore controlled by the substantive provisions of the FELA.

The state trial judge's manner of submitting Petitioner's case to the jury – particularly the submission of the unwarranted instruction on "unavoidable accident" at the behest of Respondents – reflects a failure to appreciate and properly apply the unique principles of the FELA and constitutes reversible error. There was no evidence in

this case to justify or support an instruction on unavoidable accident even under common-law principles, but it was especially improper and prejudicial to Petitioner to give the jury such an instruction in conjunction with the submission of his FELA claim.

The extent to which this Court has insisted on strict compliance with the statutory liability standards in the submission of FELA actions is illustrated by the Court's decision in *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409 (1985). In that case, the Court reversed a decision by the Missouri state court of appeals that had upheld the failure to give a jury an instruction on "present value" in assessing damages in an FELA case. Holding that such an instruction is required as a matter of federal law, the Court rejected the argument that the absence of the instruction was purely a procedural matter governed by the state's pattern FELA jury instructions. The Court said:

> As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,' " *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949), it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law.

470 U.S. at 411.

The propriety of instructions on the proper *liability* standards, and the determination of whether reversible error is presented by an incorrect instruction to the jury regarding those standards, are equally, if not more so, issues of substance which must be determined by federal law. In light of this Court's command to follow the letter of the federal law governing FELA liability, the trial court

in the present case committed fundamental error in treating Petitioner's FELA claim against Respondents as if it were governed by Texas common-law principles, particularly the regressive doctrine of "unavoidable accident."

In *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), the Fifth Circuit expressly rejected the contention that an instruction should have been given on "unavoidable accident" in an FELA case:

> Following again faithfully our admonition that 'ordinarily in [an FELA] case . . . a charge on unavoidable accident is confusing and tends to distract the jury's attention from the simple issues,' . . . the trial judge declined, over objection of the railroad, to submit a definitive issue on unavoidable accident. We fully approve. Experience demonstrates that in a charge properly structured, there is no need for it and hence no place for one.

Id. at 825. Later in the *Page* opinion, the Fifth Circuit, in addressing the propriety of a "sole proximate cause" instruction by the trial judge, made further reference to the unavoidable accident issue:

> [W]e deem it a matter of good judicial administration to point out now, as we did formerly on unavoidable accident, that ordinarily in FELA cases there is really no place for this issue in the jury submission as such. All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issues submission are in reality merely a submission in another form of questions already implicit in the basic ones. . . . This effort to cross-examine the jury – whether special interrogatories are used or in outlining the successive fact findings as a predicate for a general verdict – leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute lawyer.

Id. at 826-27. The Fifth Circuit's rejection of a jury instruction on unavoidable accident in an FELA case was reaffirmed in *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609, 614 (5th Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967).[9]

The opinion of the Beaumont court of appeals affirming the trial court's judgment in the present case denigrates these holdings and disregards the significance of the trial court's departure from the substantive federal principles of law imposed by the FELA. Rather than addressing the "unavoidable accident" instruction, the opinion skirts the issue entirely, instead focusing solely on the Beaumont court's own, baseless *sua sponte* proposition that the jury might *possibly* have believed that Nick Garcia did not sustain his back injury in the airplane accident, and therefore any errors in the charge by the trial court were "harmless" because Petitioner did not challenge that obscure *possibility* on appeal.

This reasoning puts the cart before the horse. As a matter of federal law, Petitioner was entitled to have the "injury" determination, as well as the "negligence" and "causation" determinations, resolved by the jury without improper, extraneous considerations affecting (or infecting) that determination. The "unavoidable accident" submission must be deemed harmful precisely *because* it clouded the jury's consideration of the entire FELA cause

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[9] The impropriety of an "unavoidable accident" instruction has been recognized by the Texas state courts. In *Continental Oil Co. v. Lindley*, 382 S.W.2d 296, 303 (Tex.Civ.App. – Houston 1964, writ ref'd n.r.e.), the court, citing U.S. Supreme Court precedents, observed that "it seems questionable whether the defense of unavoidable accident is available to a defendant in an FELA case. . . . " *Id.* at 303. The court in *Lindley* resolved the unavoidable-accident issue in that case on another ground, holding that the requested submission of unavoidable accident was properly refused because – as is true in the present case as well – *there was no evidence raising the unavoidable accident issue. Id.* at 304.

of action, and because we therefore cannot know by what rationale the jury concluded that none of the Respondents was liable. An improper FELA submission cannot casually be dismissed as "harmless error" by a state appellate court when the state common-law instruction in question prevents the jury from an undiluted and unfettered consideration of the federally-mandated FELA liability standards.

The submission of the "unavoidable accident" instruction did just that. The instruction was unfairly harmful to Petitioner Garcia because it diverted the jury's attention away from the Respondents' conduct and directed the jury to focus its attention instead on the avoidance of the Respondents' liability altogether. It was an extraneous instruction which tended improperly to influence the jury to accept Respondents' argument that they were not negligent. It poisoned the jury's evaluation of *the entire liability question* and was therefore reversible error as a matter of federal substantive law.[10]

It cannot be "harmless error" when an improper instruction prevents a fair and proper consideration of the essential liability issues in an FELA case.[11] Obviously,

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[10] Notably, the commentary in the Texas Pattern Jury Charges relating to "unavoidable accident" specifically suggests that the inclusion of an unavoidable-accident instruction should be treated as an "impermissible form of nudging" even under Texas law in *any* case submitted – as the present case was – under the broad form of liability questions. See 1 *State Bar of Texas, Pattern Jury Charges*, PJC 3.04.

[11] The instruction should have been considered reversible error even under the previous Texas decisions regarding broad-form submissions which the Beaumont court cited in its opinion.

For instance, in *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749-50 (Tex. 1980), the Texas Supreme Court held that it need not address the plaintiff Bailey's complaints about the

one can speculate that the jury in the present case *might* have believed that there was no negligence on the part of

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submission of certain defensive issues because the jury had specifically found that the defendant's product was not defective and the defensive issues were therefore immaterial. Similarly, in *Burnett v. File*, 552 S.W.2d 955, 958 (Tex.Civ.App. – Waco 1977, writ ref'd n.r.e.), the court of appeals held that the trial court was within its discretion in expressly conditioning all other jury questions on a finding of "injury" in the first question. The jury found no injury, so no other questions were answered. To the same effect, in *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex.App. – Beaumont 1992, no writ), the Beaumont court of appeals properly held that the submission of an incorrectly-worded instruction on "unavoidable accident" was not reversible error because the jury expressly found that the plaintiff suffered "0" damages.

The situation in the present case, however, was very different. Here, the jury never reached the damages question at all because it was conditioned on a "yes" answer to question No. 1, the sole liability question. Question No. 1 was a global inquiry encompassing (a) the Respondents' alleged negligence, (b) causation of the occurrence in question, *and* (c) the extent of injury, if any, to Petitioner Garcia. None of these various elements of the broad-form liability question was submitted separately, so we do not and *cannot* know on what basis the jury answered "no" as to any of the Defendants. The unwarranted submission of an instruction on "unavoidable accident" was harmful for *precisely that reason:* It infected the jury's entire consideration of the sole, global liability question. Compare *First International Bank in San Antonio v. Roper*, 686 S.W.2d 602, 603-4 (Tex. 1985) (erroneous submission of instruction on "sole cause" at the urging of defendant lawn-mower manufacturer "poisoned the jury verdict" because it was submitted prior to *all* of the jury questions. *Id.* at 603). See also *Lemos v. Montez*, 680 S.W.2d 798, 799-801 (Tex. 1984) (submission of "neither," which the jury found, as an alternative to inquiry about the plaintiff's and defendant's negligence, was improper submission of unsupported "unavoidable accident" theory); *Hukill v. H.E.B. Food Stores, Inc.*, 756 S.W.2d 840 (Tex. App. – Corpus Christi 1988, no writ) (unsupported submission of "unavoidable accident"

the defendants, or *might* have believed that the negligence of the defendants was not a cause of Petitioner's injuries in the plane crash, or *might* have believed that Petitioner was not as seriously injured in the crash as he contended. But Petitioner was entitled to have *all* of those hotly-contested fact issues considered under a correct set of instructions on the special governing FELA law established by Congress!

The trial court prevented a fair determination of all of the fact issues by mistakenly injecting the unsupported theory of "unavoidable accident" into the jury's consideration. Under the court's instructions, and in light of the jury's "no" finding on liability as to *all* the Defendants, it appears highly likely that the jury was misled to conclude the plane crash was an *"unavoidable accident"* – a *legally*-impermissible conclusion in an FELA negligence case.

This Court should reverse the judgments of the Texas courts and grant Petitioner a new trial.

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instruction "give[s] the jury an attractive alternative to the difficult determination of negligence . . . and as such constitutes an unconscious or hidden rebuttal to the essential issues to be determined, because it directs the jury away from the real issues submitted and the burden imposed by law of proof by the parties." *Id.* at 844).

II. REVIEW SHOULD BE GRANTED BECAUSE AS A MATTER OF LAW THE RESPONDENT RAILROAD AND THE OTHER RESPONDENTS INVOLVED IN THE FOR-PROFIT TRANSPORTATION OF PETITIONER AND OTHER RAILROAD WORKERS BY AIRCRAFT WERE NEGLIGENT PER SE IN CONDUCTING AN UNAUTHORIZED COMMERCIAL AIRCRAFT OPERATION IN VIOLATION OF PART 135 OF THE FEDERAL AVIATION REGULATIONS.

The negligence and causation issues encompassed in Question One submitted to the jury were unnecessary and improperly submitted in light of the conclusive evidence that the commercial flight operations undertaken by Respondents, and specifically the flight in question, were in direct violation of Federal Aviation Regulations (FAR) Part 135.

Plaintiff specifically objected to the submission of Question One to the jury because the violation of FAR Part 135 constituted negligence per se on the part of Respondents, and as a matter of law such negligence was a proximate cause – or at the very least a cause in whole or in part – of the airplane accident.[12]

FAR Part 135 is a comprehensive, detailed set of rules, regulations, and specifications applicable to "air taxi operations" and "[t]he carriage in air commerce of

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[12] The trial court submitted two different standards of causation as to each Respondent in Question One. The jury was asked to find whether each Defendant's conduct as negligent, and also whether such negligence was either a "proximate cause" or a "cause in whole or in part" of the occurrence in question. The latter standard, correctly defined as meaning "a cause which played any part, no matter how small, in producing the [plaintiff's] injury," is the proper standard of causation applicable to an FELA case. See, e.g., *Mitchell v. Missouri-Kansas-Texas Railroad Co.*, 786 S.W.2d 659-61 (Tex. 1990).

persons or property for compensation or hire as a commercial operator (not an air carrier) in aircraft having a maximum seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 pounds." See § 135.1.

FAR § 135.5 contains the most essential provision in Part 135; it is also directly material to the present case. Section 135.5 states:

> No person may operate an aircraft under this Part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part. . . .

FAR Part 135 unquestionably applied to the Southern Pacific "deadheading" flight operations conducted by Mike Warren and Jackie Holmes, d/b/a S.W. Air Leasing, for compensation. Holmes admitted that his contract with Southern Pacific for the flights in the Piper Lance airplane was a commercial operation intended to generate a profit. Further, both Holmes and pilot Warren Luttrell admitted that they were familiar with FAR Part 135 at the time. Although they claimed at trial that they did not think that Part 135 applied to their operation, they provided no legal reason for such alleged belief.

The Federal Aviation Administration (FAA), which investigated the accident, determined that **Luttrell was flying in violation of the provisions of FAR Part 135,** and the FAA suspended his license for 60 days as a result of the violation. Luttrell did not even contest the suspension. The FAA's order temporarily revoking Luttrell's license stated in part as follows:

> On or about August 2, 1988, you acted as pilot in command of Civil Aircraft N6486C, a Piper Model PA-32, the property of another, on a flight in air transportation carrying passengers for compensation and hire.

> The above-described flight ended in an accident while on approach to El Paso International Airport, El Paso, Texas, injuring passengers.
> At all times mentioned herein you did not hold an air taxi-commercial operator (ATCO) operating certificate and appropriate operations specifications.
> By reason of the foregoing, you violated Section 135.5 of the Federal Aviation Regulations, in that no person may operate an aircraft under Part 135 of the Federal Aviation Regulations without, or in violation of an air carrier operating certificate and operations specifications issued under Part 135 of the Federal Aviation Regulations.

Luttrell admitted at trial that neither he nor any other pilot with Gene's Flight Club of El Paso, Inc. was certified to operate an aircraft in a Part 135 operation. It was undisputed that none of the other Defendants on whose behalf Luttrell was flying – Jackie Holmes, S.W. Air Leasing, Mike Warren, or Southern Pacific – had either sought or obtained Part 135 certification for the deadhead operations and other flights in which they were using Holmes's Piper Lance airplane.

As a matter of law, the Defendants' violation of Part 135, and especially Section 135.5, was a cause in whole or in part of the occurrence in question. If Defendants had abided by the regulations and not engaged in such flights for compensation and hire when they were not certified to do so, the flight in question would never have occurred and the accident obviously would not have happened.

Under Texas law, the violation of a legislative enactment or administrative regulation establishes negligence per se if the statute or regulation "is designed to prevent an injury to that class of persons to which the injured party belongs." *El Chico Corp. v. Poole*, 732 S.W.2d 306, 312 (Tex. 1987); *Nixon v. Mr. Property Management Co., Inc.*, 690

S.W.2d 546, 549 (Tex. 1985); *Carter v. William Sommerville and Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979); *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (citing Restatement (2nd) of Torts § 288B); *Continental Oil Co. v. Simpson*, 604 S.W.2d 530, 534 (Tex.Civ.App. – Amarillo 1980, writ ref'd n.r.e.). Obviously, the purpose of the Part 135 regulations governing the transportation of persons for compensation or hire is to protect the safety of the passengers on such commercial charter flights, which include Nick Garcia and the other railroad workers on the "deadhead" flight in question.

Apparently no Texas court has ruled on whether the violation of a Federal Aviation Regulation establishes negligence per se. But a number of other state and federal courts have addressed this issue. The Fifth Circuit has held, as have several other federal appellate courts, that the FARs have the force and effect of law. *Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1446, (5th Cir. 1990), *rehearing denied in part and granted in part on other grounds*, 905 F.2d 61 (5th Cir. 1990); *In Re N-500-L Cases*, 691 F.2d 15, 28 (1st Cir. 1982); *Rodriguez v. United States*, 823 F.2d 735 (3rd Cir. 1987).

The Fifth Circuit has not directly held that the violation of a Federal Aviation Regulation is negligence per se, though it has discussed the issue in at least two cases, *Hayes, v. United States*, 899 F.2d 438, 443-4 (5th Cir. 1990), and *Swoboda v. United States*, 662 F.2d 326, 329 (5th Cir. 1981), *rehearing denied*, 668 F.2d 532 (5th Cir. 1982), *cert. denied*, 457 U.S. 1134 (1982). However, the court in both *Hayes* and *Swoboda* found other grounds on which to base its decisions.

Other courts have held that the violation of an FAR is negligence per se. In *In Re N-500-L Cases*, 691 F.2d 15, 28 (1st Cir. 1982), the First Circuit said:

> The Federal Aviation Administration (FAA) has promulgated regulations (FARs) that govern,

> inter alia, the operation of airplanes by pilots. Pilot's "rules of the road" are found in Part 91 of title 14 of the Code of Federal Regulations, with additional rules for air taxi operations, such as N-500-L in this instance, located in Part 135. ***These regulations have the force and effect of law,*** [citations omitted], . . . ***and their violation is negligence per se.***

691 F.2d at 28. (emphasis added) See also *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3rd Cir. 1968) (holding that it was negligence per se for single-engine charter pilot to fly into adverse weather conditions and proceed toward airport despite warnings of low visibility, in violation of FAA's visual flight regulations).

Petitioner Garcia met his burden as the Plaintiff at trial by undisputedly and conclusively establishing that there was a failure by each and all of the Respondents to comply with FAR Part 135, and that but for Respondents' conduct of the unlawful commercial flight operation, this accident and Petitioner Garcia's injury would never have happened.

An aeronautics expert, Norman Horton, called as an expert witness by Petitioner, testified that Part 135 applied to all of the Respondents, since they were all engaged in the commercial flight operation, and that they absolutely were in violation of numerous provisions of the Part 135 regulations. There was no competent evidence to the contrary.

However, even if a strained interpretation concludes that the violation of FAR Part 135 did not constitute negligence per se as to all of the Respondents, it plainly did as to the pilot, Respondent Luttrell, because the FAA specifically cited him and suspended his license for the violation. Luttrell's negligence is attributed as a matter of law to Defendant Southern Pacific, because as a matter of law Luttrell was an agent of Southern Pacific under the FELA.

In *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958), this Court expressly held that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA." *Id.* at 332. *Sinkler* was a case arising in Texas in which the railroad contended that an injury to one of its employees caused by the negligence of an independent contractor could not be attributed to the railroad under the FELA. The Supreme Court rejected that argument and held that the negligent performance of any operational activity being performed on behalf of a railroad, even by an independent contractor, subjects the railroad to liability for any resulting injury to any of its employees. The Court specifically noted that "in interpreting the FELA, we need not depend upon common-law principles of liability." *Id.* at 329. Petitioner objected to the submission of the liability issues in Question One on the grounds that the Defendants' liability was established as a matter of law by virtue of their negligence per se in violating FAR Part 135. (Supp. SF 5-8)

The trial court committed reversible error in submitting Question One to the jury and in refusing to hold as a matter of law that the Respondents were negligent and that such negligence was a cause in whole or in part of Petitioner's injury. The appellate courts of Texas erred in failing to correct this deprivation of justice to Petitioner.

The judgments below should be reversed and this cause should be remanded for a new trial.

CONCLUSION

Petitioner Nick Garcia did not have the legally proper trial to which he was entitled by federal statute, nor was there a fair submission of his FELA claims against Southern Pacific and the other Respondents, of whom all were engaged in the charter flight operation under contract with Southern Pacific.

Ignoring the impact of substantive federal law on its review of the jury charge, the Texas court of appeals mistakenly interpreted the improper "unavoidable accident instruction" as "harmless error." In the context of this FELA injury claim, however, such a substantive error cannot be considered harmless.

Petitioner is entitled to a new trial under the proper federal standards and instructions applicable to FELA cases.

WHEREFORE, Petitioner Nick Garcia respectfully prays that the Supreme Court grant his Petition for Writ of Certiorari; that the Court reverse the judgments of the

Texas courts below; and that the Court direct the remand of this cause for a new trial.

Respectfully submitted,

PAUL E. KNISELY
Counsel of Record

BROADUS A. SPIVEY
SPIVEY, GRIGG, KELLY & KNISELY
P.O. Box 2011
Austin, TX 78768
512/474-6061
(telecopier 512/474-1605)

GILBERT I. LOW
ORGAIN, BELL & TUCKER
470 Orleans St.
Beaumont, TX 77701
409/838-6412
(telecopier 409/838-6959)

Attorneys for Petitioner
Nick Garcia

Appendix A

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-91-284-CV

NICK GARCIA, Appellant

V.

SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellees

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On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-136,293

OPINION

This is the appeal of a take-nothing judgment in a jury trial of a suit for negligence at common law and under the Federal Employers' Liability Act (FELA). Nick Garcia was one of several employees of Southern Pacific Transportation Company being flown by airplane from Tucumcari, New Mexico to El Paso, Texas. Garcia alleged he received injuries during landing because the plane encountered a wind shear created by thunderstorm. Garcia raises four points of error on appeal, to-wit:

Point of error one: The trial court erred in submitting an instruction to the jury on "unavoidable accident," because there was no evidence of an unavoidable accident in this case and as a matter of law an instruction on unavoidable accident is improper in an FELA case.

Point of error two: The trail court erred in submitting Question One to the jury concerning the Defendants' negligence and causation of the occurrence in question, because the evidence conclusively established that all of the Defendants were negligent per se in conducting an unauthorized commercial aircraft operation for compensation or hire in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or a cause in whole or in part of the occurrence in question.

Point of error three: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Warren Luttrell because the jury's "no" answer to Question One(b), concerning whether the conduct of Warren Luttrell was negligent and a cause in whole or in part of the occurrence in question, is contrary to the overwhelming weight of the evidence.

Point of error four: The trial court erred in denying the Plaintiff's Motion for New Trial as to Defendant Southern Pacific Transportation Company because as a matter of law Warren Luttrell was acting as an agent of Southern Pacific on the occasion in question.

Question One was a global submission of all elements of the cause of action under common-law negligence and FELA as to all defendants, as follows:

Was the negligence, if any, of the defendants a cause, in whole or in part, or proximate cause, of the occurrence in question, *and injury, if any*[1], to Nick Garcia:

Answer "Yes" or "No" to each of the following:

Answer "Yes" or "No"

	Proximate Cause	Cause in whole or in part
a. Jackie Holmes	No	No (10-2)
b. Warren Luttrell	No	No (10-2)
c. Gene's Flight Club of El Paso, Inc.	No	No (unam.)
d. Mike Warren	No	No (unam.)
e. Southern Pacific	No	No (unam.)

All of Garcia's points of error either challenge the charge given on the negligence and causation issues, or the sufficiency of the evidence to support the jury's finding on the negligence and causation issues. None of the points of error, or the arguments under the points of error, urge that the jury finding of no injury is against the overwhelming weight and preponderance of the evidence, or that injury was established as a matter of law. Garcia did not seek medical attention for two weeks after the incident, although he has since received treatment for a back injury. Injury was an issue at trial, but even if it was not, injury was included within Question One. The jury could have determined that, although all of the defendants were negligent and their negligence caused

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[1] Emphasis added.

the occurrence, Garcia received no injury. Such a finding would result in the answer given by the jury in this case and the take nothing judgment would then be proper unless appellant successfully challenged the "no injury" finding on appeal.

Modern jury charge practice normally combines the injury issue with the damages question. Although the "Van Zandt"[2] issue is not utilized in modern jury charge practice, the issue here is one of appellate procedure rather than charge procedure. Error in the submission of an issue is harmless when the findings of the jury in answer to other issues are sufficient to support the judgment. *Boatland of Houston, Inc. v. Bailey,* 609 S.W.2d 743, 749 (Tex. 1980); *Texas Const. Service Co. of Austin v. Allen,* 635 S.W.2d 810, 814 (Tex. App. – Corpus Christi 1982, writ ref'd n.r.e.). It is appropriate to submit a global charge to the jury, but to then obtain a reversal of the judgment entered on the jury's verdict, the appealing party must attack each and every ground upon which the verdict might have been rendered. The omission of any possible ground upon which the judgment might have been rendered compels the appellate court to affirm the judgment as it finds support in grounds not raised as error on

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[2] Under the former special issue practice, when the existence of an injury was controverted it was not a sufficient submission of that ultimate fact issue, over objection, to inquire whether a particular negligence act was a proximate cause of plaintiff's injuries, if any, or what amount of money will compensate the plaintiff for the injuries, if any, sustained as a proximate result of the defendant's negligence, if any. *Texas & Pacific Railway Company v. Van Zandt,* 159 Tex. 178, 317 S.W.2d 528 (1958).

appeal. When the jury fails to find that the plaintiff has been injured, all other issues become immaterial. *Burnett v. File*, 552 S.W.2d 955, 958 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.). This is similar to the situation which arises when the jury finds negligence but fails to find damages; the plaintiff must challenge both findings to obtain reversal on appeal. *Tate v. Sharp*, 831 S.W.2d 899, 900 (Tex. App. – Beaumont 1992, no writ). Assuming we find error in each of the points of error, we cannot find that the trial court erred in entering the take-nothing judgment because appellant does not challenge the implied finding that he failed to prove injury by a preponderance of the evidence.

We are not authorized to reverse the judgment of the trial court unless the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. TEX. R. APP. P. 81(b)(1). The broad form jury question combined negligence, proximate cause and injury. If negligence and proximate cause were found by the jury, but no injury, the jury would have answered "no" to all defendants, as it did. Assuming without deciding that such a "no injury" finding would be against the overwhelming weight and preponderance of the evidence, appellant does not challenge such a finding by point of error. Therefore, there is a theory submitted to the jury which supports the take-nothing judgment regardless of the merit of appellant's points of error.

Points of error one through four are overruled. The judgment is affirmed.

AFFIRMED.

PER CURIAM

Opinion Delivered
December 3, 1992
Do Not Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

Appendix B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 14, 1993

Mr. Paul E. Knisely
Spivey, Grigg, Kelly
& Knisely
P.O. Box 2011
Austin, TX 78768

Mr. Gilbert I. Low
Orgain, Bell & Tucker
470 Orleans Street
Beaumont, TX 77701

Mr. Michael R. McGown
Weller & Green
P.O. Box 350
Beaumont, TX 77704-0350

Ms. Beth Lazen
Mehaffy & Webber
P.O. Box 16
Beaumont, TX 77704

Mr. Mike Warren
1309 Hookridge Drive
El Paso, TX 79925

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly
& Knisely
P.O. Box 2011
111 West Sixth Street,
Suite 300
Austin, TX 78768-2011

Mr. Edward C. Hughes
1231 Wyoming
El Paso, TX 79903

Mr. Daniel V. Flatten
Mehaffy & Weber
P.O. Box 16
Beaumont, TX 77704

Mr. Dewey J. Gonsoulin
Mehaffy & Weber
P.O. Box 16
Beaumont, TX 77704

RE: Case No. D-3407

Style: NICK GARCIA v. SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO, WARREN LUTTRELL, and SOUTHERN PACIFIC TRANSPORTATION COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk

by /s/ Courtland Crocker
Courtland Crocker
Deputy